



## **Case Summary**

Appellant-Defendant Christopher J. Smith (“Smith”) appeals his convictions and aggregate sixty-four-year sentence for one count of Child Molesting, a Class A felony,<sup>1</sup> and two counts of Sexual Misconduct with a Minor, one as a Class B felony and one as a Class C felony.<sup>2</sup> We affirm his convictions but revise his sentence to forty-four years.

## **Issues**

Smith presents six issues for review, which we have consolidated and restated as the following four issues:

- I. Whether the trial court properly denied Smith’s motion to sever the charges against him;
- II. Whether the trial court abused its discretion in the admission of evidence;
- III. Whether there is sufficient evidence to support the Child Molesting conviction; and
- IV. Whether Smith was properly sentenced.

## **Facts and Procedural History**

During the summer of 2005, thirty-four-year-old Smith was a part-time employee at a skating rink in Warsaw, Indiana. At the skating rink, Smith met thirteen-year-old B.R., who had befriended Smith’s daughter. Smith’s daughter invited B.R. to spend the night with her and B.R. accepted. Thereafter, Smith asked B.R. if she would babysit his three children while he worked a third-shift job. B.R. accepted the babysitting offer, and began to

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<sup>1</sup> Ind. Code § 35-42-4-3.

<sup>2</sup> Ind. Code § 35-42-4-9.

frequently stay overnight at Smith's apartment.

B.R. "had a crush on" Smith and when Smith asked her to "go have sex," she agreed. (Tr. 70.) Smith and B.R. "had sex ... about two or three times." (Tr. 73.) B.R. confided in her friend A.S. about her sexual relationship with Smith, claiming, "it's the best sex she ever had." (Tr. 57.) B.R. invited A.S. to go skating and stay overnight at Smith's apartment. She also invited A.S. to engage in a "threesome" with Smith as his birthday present. (Tr. 50.) A.S. declined because she was afraid, so B.R. advised her to "act like you're asleep and he won't do nothing." (Tr. 50.)

On December 3, 2005, after going skating with Smith and his three children, B.R. and A.S. returned to Smith's apartment for the night. B.R. and A.S. shared a bed in the same room where Smith's two sons were sleeping in other beds. At some point, Smith came into the room and lay down in the middle of B.R. and A.S. He repeatedly told B.R. that he wanted "to make a move on [A.S.]" and B.R. tried to discourage him by explaining that A.S. was afraid. Smith told B.R. to leave the room and eventually she complied.

Smith began rubbing A.S.'s leg and moved his hand underneath her shirt. He then put his hand into her pants and inserted his fingers into her vagina. A.S. pushed Smith away, saying "Hell, no, I know what the f--- you're trying to do." (Tr. 53.) Smith grabbed A.S.'s arm and pushed her back onto the bed. One of Smith's sons coughed and rolled over in his bed. A.S. then jumped up and ran out.

A.S. called her parents to come and get her. They found her "running around the parking garage" in the apartment complex, cold, wet, and crying hysterically. (Tr. 28.)

A.S.'s father called the police. The ensuing investigation led to the State charging Smith with two counts of Child Molesting (for acts against B.R.) and two counts of Sexual Misconduct with a Minor (for acts against A.S. and B.R.).

Prior to trial, Smith moved to sever the charges involving A.S. from the charges involving B.R. His motion was denied, as was his renewed motion on the day of trial. A jury trial commenced on April 25, 2006. At its conclusion, Smith was acquitted of one count of Child Molesting alleged to have been committed against B.R. He was found guilty of the remaining charges.

On May 25, 2006, the trial court sentenced Smith to serve fifty years imprisonment for the Class A Child Molesting conviction, ten years imprisonment for the Class B Sexual Misconduct conviction, and four years imprisonment for the Class C Sexual Misconduct conviction. The terms were to be served consecutively, providing for an aggregate sentence of sixty-four years. Smith now appeals.

## **Discussion and Decision**

### **I. Severance of the Charges**

Smith contends that the trial court improperly tried all the charges against him together, arguing that they were joined solely because they were of the same character. Indiana Code § 35-34-1-9(a) allows two or more offenses to be joined in the same charging document when the offenses are:

- (1) of the same or similar character, even if not part of a single scheme or plan; or
- (2) based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

When multiple offenses are contained in the same charging document, Indiana Code § 35-34-1-11(a) provides for the severance of the offenses as follows:

(a) Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:

- (1) the number of offenses charged;
- (2) the complexity of the evidence to be offered; and
- (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

Thus, in interpreting these statutes, severance of offenses is a matter of right under subsection 11(a) only when the offenses are joined solely because they are of the same or similar character. Blanchard v. State, 802 N.E.2d 14, 25 (Ind. Ct. App. 2004). However, if the State establishes that all offenses are sufficiently linked together, the matter of severance is to be determined by the trial court. Id. Charges may be sufficiently linked together if they are connected by a distinctive nature, a common modus operandi linked the crimes, and that the same motive induced the criminal behavior. Id.

The record reflects that the crimes with which Smith was charged were linked in the following manner. Smith met young girls through his employment at a skating rink. Having established a sexual relationship with B.R., Smith used that relationship to cultivate an acquaintance with A.S. Smith hosted both the girls in his home with his children present, using the pretense that he needed to have childcare for his children. He provided a single bed

for B.R. and A.S. He then climbed into the shared bed and pursued his expressed plan of having a “threesome,” a sexual encounter involving himself, B.R., and A.S. (Tr. 50.) Smith lay down between the two girls and persistently questioned B.R. about whether A.S. “was going to have sex.” (Tr. 51.) After B.R. tried to dissuade Smith from having sex with A.S., Smith fondled A.S.

Accordingly, the charges brought against Smith were not joined solely because they were of the same or similar character, but were joined because of the series of acts connected together. Pursuant to Indiana Code Section 35-34-1-11(a), severance was a matter within the trial court’s discretion, taking into account: (1) the number of offenses charged; (2) the complexity of the evidence to be offered; and (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense. A denial of severance will then be reversed only upon a showing of clear error. Blanchard, 802 N.E.2d at 26.

The State charged Smith with four offenses, three against B.R. and one against A.S. Nevertheless, Smith’s crime against A.S. was so inextricably intertwined with Smith’s victimization of B.R. that it could not be fully explained without reference to Smith’s conduct with B.R. Moreover, it is apparent that, despite multiple victims, the jury could distinguish the law and apply the law intelligently. The jury chose to convict Smith of three of the charged offenses, while acquitting him of an alleged offense against B.R. We find no abuse of discretion in the trial court’s refusal to sever the charges.

## II. Admission of Evidence

Smith next contends that he was denied a fair trial by the trial court's evidentiary rulings. Specifically, he challenges the admission of medical records pertaining to himself and to A.S. He also claims that A.S. was improperly permitted to testify that B.R. told her sex with Smith was "the best sex she had ever had." (Tr. 57.)

The standard of review for admissibility of evidence issues is whether the trial court's decision was an abuse of discretion. Allen v. State, 813 N.E.2d 349, 361 (Ind. Ct. App. 2004), trans. denied. The decision whether to admit evidence will not be reversed absent a showing of manifest abuse of a trial court's discretion resulting in the denial of a fair trial. Id. Generally, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. Indiana Evidence Rule 103(a); Coleman v. State, 694 N.E.2d 269, 277 (Ind. 1998). In determining whether an evidentiary ruling affected a party's substantial rights, the court assesses the probable impact of the evidence on the trier of fact. Id.

A.S.'s Medical Record. A.S. was examined at the Kosciusko Community Hospital and the State offered into evidence an "Emergency Department Note," a summary of the attending physician's observations of A.S. (State's Ex. 1) Smith claims the admission of this document was unduly prejudicial to him because it "stated that the Defendant had raped A.S., and this examination was a result of that attack." Appellant's Br. at 13. Smith did not object on this basis at trial; therefore, the argument is waived. Gill v. State, 730 N.E.2d 709, 711 (Ind. 2000). Waiver notwithstanding, the record does not support Smith's claim. State's

Exhibit 1 does not state that Smith raped A.S. Rather, it states that the patient's complaint is an alleged sexual assault and specifies that no rape kit was compiled because the patient denied that an act of sexual intercourse took place.

Smith's Medical Record. During B.R.'s testimony, the prosecutor asked if she had used birth control during the sexual encounters with Smith. B.R. replied, "No, he said he was fixed." (Tr. 77.) She also testified that Smith showed her a piece of paper to support his claim. The State then offered into evidence State's Exhibit 8, Smith's medical report from the Kosciusko Community Hospital disclosing the volume and motility of seminal fluid. Smith objected to the admission of State's Exhibit 8, arguing that it did not establish Smith's sterility and was thus irrelevant. Alternatively, he requested a limiting instruction that "they should not take any of the content of that piece of paper as anything else other than identification of a piece of paper that this witness was shown." (Tr. 80.) On appeal, Smith claims that his alleged sterility is irrelevant and that State's Exhibit 8 had the potential for misuse by the jury because they could infer that he was in fact sterile.

Pursuant to Indiana Evidence Rule 401, "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, whether Smith is sterile or fertile is of no relevance. Rather, the document is relevant to corroborate B.R.'s allegations that Smith had sexual intercourse with her and showed her a medical record to support his claim that he could not impregnate her. Moreover, the document does not state that Smith is sterile and thus the potential for juror confusion or

misuse is not apparent. The trial court did not abuse its discretion by admitting the document or refusing Smith's somewhat perplexing limiting instruction.

A.S.'s Testimony. Smith claims that the trial court should have excluded as hearsay A.S.'s testimony concerning what B.R. told her of the sexual relationship between B.R. and Smith. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Had Smith promptly objected on hearsay grounds, the trial court may have excluded A.S.'s retelling of B.R.'s statements. However, A.S.'s testimony was, for the most part, admitted without objection from Smith.

If a defendant does not object contemporaneously with the introduction of the evidence, appellate review of the issue is waived unless the admission of evidence constitutes fundamental error. Sauerheber v. State, 698 N.E.2d 796, 804 (Ind. 1998). The fundamental error exception is extremely narrow. Boesch v. State, 778 N.E.2d 1276, 1279 (Ind. 2002), reh'g. denied. Fundamental error is error that is "so prejudicial to the rights of the defendant as to make a fair trial impossible." Willey v. State, 712 N.E.2d 434, 444-45 (Ind. 1999).

A.S. testified without objection as follows:

A.S.: [B.R.] had came and said, I want you to meet my love and I said, okay, and we went and met him. . . .

Q: Had [B.R.] suggested to you at all why you were going to Christopher Smith's house that night?

A.S.: Yes.

Q: What was your understanding as to why you were going?

A.S.: She had said that she wanted a threesome with Chris and it was his birthday gift.

Q: What was your response to that?

A.S.: I said I didn't know because I was scared to have sex. . . .

Q: Prior to December 3, 2005, were you aware of the relationship between [B.R.] and Christopher Smith?

A.S.: Yes.

Q: Had you ever talked to [B.R.] about her having sexual relations with Christopher Smith before that time?

A.S.: Yes.

Q: How many times?

A.S.: We had talked about it at [corn] detassling and she had told me not to tell no one because he was too old and she didn't want no one to find out and she didn't want him in trouble.

(Tr. 45-56.) At this juncture, Smith lodged a hearsay objection to “continuing testimony regarding what [B.R.] told her.” (Tr. 56.) The objection was overruled and A.S. testified further that B.R. described Smith as the “best sex she ever had.” (Tr. 57.)

The portion of A.S.'s testimony that was hearsay was essentially cumulative of B.R.'s testimony. Such cumulative evidence did not deny Smith a fair trial. However, A.S. also added that B.R. claimed Smith was “the best sex ever.” Undoubtedly, this testimony did not reflect favorably upon Smith. Nevertheless, we do not conclude that the additional characterization would have had an impact on the jury sufficient to affect Smith's substantial rights or deny him a fair trial.

Smith has demonstrated no reversible error in the trial court's evidentiary rulings.

### III. Sufficiency of the Evidence – Child Molesting

Smith argues that the State failed to prove he committed Child Molesting, a Class A felony, because the evidence did not establish that B.R. was less than fourteen years old at the time of the alleged offense.

To obtain a conviction for child molesting as a Class A felony, as charged, the State was required to prove that Smith, a person over the age of twenty-one, performed sexual intercourse with B.R., a child under age fourteen, “on or about June 2005.” (App. 67.) See Ind. Code § 35-42-4-3(a)(1).<sup>3</sup>

When reviewing a claim of insufficiency of the evidence, we consider only the evidence most favorable to the verdict and the reasonable inferences that can be drawn therefrom. Dillard v. State, 755 N.E.2d 1085, 1089 (Ind. 2001). We do not reweigh evidence or assess witness credibility. Id. The conviction will be affirmed unless we conclude that no reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Clark v. State, 728 N.E.2d 880, 887 (Ind. Ct. App. 2000), trans. denied.

At trial, B.R. testified that the first act of sexual intercourse took place when she was babysitting and before she began a summer job detassling corn. Payroll records indicated that the detassling job began in July of 2005, a month before B.R.’s fourteenth birthday. (State’s Ex. 15.) B.R. also testified as follows:

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<sup>3</sup> In most circumstances, time is not of the essence in the crime of child molesting. Barger v. State, 587 N.E.2d 1304, 1307 (Ind. 1992), reh’g denied. Rather, the exact date is only important in limited circumstances, such as where the victim’s age at the time of the offense falls at or near the dividing line between classes of felonies.

B.R.: He's like, well, lets go back here and have sex, I'm like, okay, you know, and then I went back there and we had sexual intercourse and then the kids came back in and he acted like nothing happened. . . .

Q: Did he insert his penis in your vagina? . . .

B.R.: Yes. . . .

Q: When was the next time that you remember you had sex with him?

B.R.: After detassling.

Q: After detassling?

Q: Was it before or after your fourteenth birthday?

B.R.: It was before.

Q: What happened?

B.R.: It was the same thing like before. He had sexual intercourse. He inserted his penis in my vagina and that's just what happened each time.

(Tr. 71-73.) There is sufficient evidence from which the factfinder could conclude that B.R. was less than fourteen years old when Smith had sexual intercourse with her and that at least one incident took place during or near June 2005. Smith testified that he was thirty-four years old. Accordingly, there is sufficient evidence to support Smith's conviction of Child Molesting as a Class A felony.

### V. Sentencing

Finally, Smith challenges his aggregate sixty-four-year sentence as inappropriate. More specifically, he argues that the trial court improperly analyzed aggravating and mitigating factors.

Indiana Code Section 35-50-2-4, effective April 25, 2005, provides in pertinent part, “A person who commits a Class A felony shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years.” Indiana Code Section 35-50-2-5 provides in pertinent part, “A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years.” Indiana Code Section 35-50-2-6 provides in pertinent part, “A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years.”

Smith received the maximum term for the Class A felony and advisory terms for the Class B and Class C felonies, all to be served consecutively. The trial court found as aggravators that the victims were in Smith’s care or control, that A.S. was grabbed, bruised, and caused to suffer emotional distress, and that Smith’s own children were present. The trial court refused to accord Smith’s lack of prior convictions mitigating weight, stating:

This was not the first trial that I sat through, Mr. Smith, and admittedly, you were found not guilty by a jury of twelve people who heard evidence of a similar nature. But I heard the same evidence. I heard the same scheme, the same course of conduct, the use of the skating rink and it is beyond me, Mr. Smith, how I could ever find that you have led a law abiding life and have no history of delinquency or criminal activity. I don’t buy that. But let’s say that you do have no history of criminal activity, I think given the aggravating factors that I mentioned, it is so insignificant in the total scheme of things that I wouldn’t give it any weight anyway.

(Tr. 212.) Smith claims that each of the named aggravators is improper and that the trial court should have found in mitigation that he had no criminal history and was the custodial parent of three children.

In general, sentencing determinations are within the trial court's discretion. Cotto v. State, 829 N.E.2d 520, 523 (Ind. 2005). Indiana Code Section 35-38-1-7.1(a)(2) provides that a sentencing court may consider the defendant's history of criminal or delinquent behavior. Subsection (b) provides that the court may consider mitigating circumstances. However, "[a] court may impose any sentence that is authorized by statute and permissible under the Constitution of the State of Indiana, regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d).

Accordingly, the court may impose any sentence within the sentencing range without regard to the presence or absence of such circumstances. "Because the new sentencing statute provides a range with an advisory sentence rather than a fixed or presumptive sentence, a lawful sentence would be one that falls within the sentencing range for the particular offense." Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005). The sentence imposed upon Smith was within the sentencing range applicable to Class A felonies. However, where the trial court at sentencing hears evidence of mitigating and aggravating circumstances, and makes findings in that regard, such findings assist in our review of the appropriateness of the sentence.

Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

Here, the trial court's sentencing statement is somewhat inconsistent in directing our attention to relevant facts bearing upon the nature of the offenses and the character of the

offender. The record supports the finding that A.S. and B.R. were under Smith's care and control because he hosted the underage girls in his home as overnight guests. Logically, the only adult on the premises would be responsible for the safety of the minors. Too, Smith's own children were in the room when Smith committed his offense against A.S. and A.S. exhibited both physical and emotional trauma from the events. However, the maximum sentence was imposed for Smith's molestation of B.R. and not for his conduct with A.S.

Even more perplexing is the trial court's refusal to acknowledge that Smith does not have a criminal history of convictions. He was previously charged with a sexual offense, tried before a jury, and acquitted. Neither this Court nor the trial court may simply disregard the role of jurors in assessing guilt or innocence. An arrest is not equivalent to a criminal conviction. Cotto, 829 N.E.2d at 526. We agree with Smith that his lack of a criminal history deserves mitigating weight. However, we are not similarly persuaded that his role as a single parent is deserving of significant mitigating weight. Our Supreme Court has stated, "[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999).

The nature of Smith's offense against A.S., the Class C felony, is that he used gratuitous violence. Two of his minor children were present. His offenses against B.R. were accomplished not with violence but with the carefully orchestrated plan of a predator. He met B.R. at a skating rink, using his own daughter's friendship with her to establish an acquaintance. He then invited B.R. into his home and propositioned her. To encourage

B.R.'s acquiescence, he assured her that he could not impregnate her. He promised her jewelry. He introduced the idea of a "threesome" and essentially caused B.R. to endanger her own friend.

The nature of his character is that he was the sole custodian of three children and had provided for them through gainful employment. He had no criminal history of convictions.

As such, we do not perceive that the nature of the offenses and the character of the offender here suggest maximum and consecutive sentences. However, these same considerations do not suggest a minimal sentence. Pursuant to Indiana Appellate Rule 7(B), we revise Smith's sentence to forty-four years (thirty years for the Class A felony, ten years for the Class B felony and four years for the Class C felony, to be served consecutively).

### **Conclusion**

The trial court did not abuse its discretion by refusing to sever the charges against Smith. The evidentiary rulings of the trial court did not deny Smith a fair trial. The State presented sufficient evidence to support his conviction of Child Molesting as a Class A felony. However, our independent review of the nature of the offense and the character of the offender leads to our revision of his sentence.

Affirmed in part; reversed in part.

VAIDIK, J., and BARNES, J., concur.